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December 31, 2007

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Pages including this page: 28

Cetrangelo 10/656,953

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	First Named Inventor	Cetrangelo	
	Art Unit	1792	
	Examiner Name	EI Arni	
Total Number of Pages in This Submission	27	Attorney Docket Number	CETR200

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Cetrangelo

PATENTS

Serial No. 10/656,953

Group Art Unit: 1746

Filed: 09/08/2003

Examiner: El Arini

For: DEVICE FOR CLEANING DENTAL INSTRUMENTS

RESPONSE TO NOTICE OF NON-COMPLIANT APPEAL BRIEF

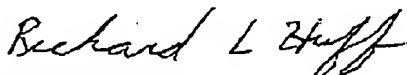
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This is responsive to the Notice of Non-compliant Appeal Brief
mailed 12/20/2007.

Enclosed is a signed appeal brief complying with 37 CFR 41.37(c)
(1)(iv). The examiner's answer is awaited.

Respectfully submitted,



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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Cetrangelo

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Serial No. 10/656,953

Group Art Unit: 1746

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For: DEVICE FOR CLEANING DENTAL INSTRUMENTS

APPEAL BRIEF

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1) **Real Party in Interest**

The real party in interest is **Regina Cetrangelo, the inventor/appellant.**

2) *Related Appeals and Interferences*

There are no related appeals or interferences.

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3) **Status of Claims**

Claims 1-10 are all the claims in this case. Claims 1-10 are rejected. Claims 1-10 are on appeal.

4) Status of Amendments

No amendments have been filed subsequent to the final rejection.

5) Summary of Claimed Subject Matter

The invention is directed to devices for holding gauze so that a dental technician may clean the tip of a dental instrument without fear of being stuck by the dental instrument which contains fluids from the patient's mouth, which fluids may contain HIV or other infectious pathogens. The invention is also concerned with methods of using the devices. This claimed subject matter may be best understood with reference to Figs. 1-6.

Claim 1 is drawn to a device for cleaning dental instruments comprising: a finger rest, a stem, and an open container having an exterior surface, an interior surface, and a top. The exterior surface has a girth near the top. The interior surface contains a plurality of prongs. The top has a protective rim to prevent finger sticks by the tip of the dental instrument.

The device is referred to on page 7, line 17 and is identified by numeral 2 in the drawings. The finger rest is referred to on page 7, line 18 and is identified by numeral 4 in the drawings. The stem is referred to on page 7, line 21 and is identified by numeral 6 in the drawings. The open container is referred to on page 8, lines 2 and 3 and is identified by numeral 8 in the drawings. The exterior surface of the container is referred to on page 8, lines 4 and 5 and is identified by numeral 12 in the drawings. The interior surface is referred to on page 8, line 17 and is identified by numeral 26 in the drawings. The top is referred to on page 8, lines 2-3 and is identified by numeral 10 in the drawings. The girth of the exterior surface is referred to on page 8, lines 5-8 and is identified by numeral 14 in the drawings. The prongs are referred to on page 8, lines 17-20 and are identified by numeral 28 in the drawings. The protective rim is referred to on page 8, lines 8 and 9 and is identified by numeral 16 in the drawings.

Claim 4 is drawn to the device of claim 1 containing gauze. Gauze is referred to on page 9, lines 3-14 and is identified by numeral 18 in the drawings.

Independent claim 5 is drawn to a device for cleaning dental instruments comprising: a finger rest, a stem, and an open container having an exterior surface, an interior surface, and a top. The interior surface contains a plurality of prongs. The top has a protective rim to prevent finger sticks by the tip of the dental instrument.

The device is referred to on page 7, line 17 and is identified by numeral 2 in the drawings. The finger rest is referred to on page 7, line 18 and is identified by numeral 4 in the drawings. The stem is referred to on page 7, line 21 and is identified by numeral 6 in the drawings. The open container is referred to on page 8, lines 2 and 3 and is identified by numeral 8 in the drawings. The exterior surface of the container is referred to on page 8, lines 4 and 5 and is identified by numeral 12 in the drawings. The interior surface is referred to on page 8, line 17 and is identified by numeral 26 in the drawings. The top is referred to on page 8, lines 2-3 and is identified by numeral 10 in the drawings. The prongs are referred to on page 8, lines 17-20 and are identified by numeral 28 in the drawings. The protective rim is referred to on page 8, lines 8 and 9 and is identified by numeral 16 in the drawings.

Dependent claim 6 is similar to claim 5, but contains gauze. Gauze is referred to on page 9, lines 3-14 and is identified by numeral 18 in the drawings.

Method claims 9 and 10 are drawn to the use of the devices of claims 4 and 6 respectively. Each of these claims requires the steps of holding the device of claim 4 or 6 in one hand (page 9, line 6), holding the dental instrument in the other hand (page 9, line 8), placing the pointed tip of the dental instrument inside the open container (page 9,

lines 8 and 9), putting the pointed tip of the dental instrument in contact with the gauze (page 9, lines 9 and 10), applying pressure to the container to assure firm contact between the instrument and the gauze (page 9, lines 10 and 11), wiping the tip of the instrument on the gauze (page 9, lines 11 and 12), and removing the instrument from the open container (page 9, lines 12 and 13).

6) Grounds of Rejection to be Reviewed on Appeal

a) Whether claims 1, 3, and 5 are properly rejected under 35 USC 102(b) as being anticipated by Wallock et al.

b) Whether claims 2, 4, and 6 are properly rejected under 35 USC 103(a) as being unpatentable over Wallock et al. in combination with Williams.

c) Whether claims 7-10 are properly rejected under 35 USC 103(a) as being unpatentable over Cerroni in combination with Wallock et al and Williams.

7) Argument

Claims 1, 3, and 5

The Board of Patent Appeals and Interferences held in Ex parte Levy, 17 USPQ2d 1461 (BPAI 1990) that:

The factual determination of anticipation requires The disclosure in a single reference of every element of the claimed invention.... Moreover, it is incumbent upon the examiner to identify wherein each and every facet of the claimed invention is disclosed in the applied reference.

The device of claim 1 requires a finger rest. The examiner does not identify wherein the Wallock et al reference discloses a finger rest.

The device of claim 1 requires a stem. The examiner does not identify wherein the Wallock et al reference discloses a stem.

The device of claim 1 requires an open container. The examiner correctly states that the reference discloses a container, but fails to identify wherein the reference teaches an open container. The container of Wallock et al. is a tubular device. The tubular body contains what the examiner refers to as prongs. There is a closed bottom end which contains a liquid. There is a top end which contains two disks, one above the other, which close the container. These disks contain slits arranged in such a way as to allow the passage of the medical instrument while keeping the top closed. If it is the examiner's position that the container or housing 17 of the reference constitutes the open container called for by the claims, then the rejection must fail because this container is closed. If it is the examiner's position that the safety collar or guard 45 of the reference constitutes the open container called for by the claims then the rejection must fail because this open container does not contain an interior surface containing a plurality of prongs.

The device of claim 1 requires that the open container has an exterior surface.

The examiner does not identify wherein the container has an exterior surface.

The device of claim 1 requires that the container has an interior surface. The examiner does not identify wherein the container has an interior surface.

The device of claim 1 requires that the device has a top. The examiner does not identify a top in the cited reference.

The device of claim 1 requires that the exterior surface has a girth near the top. A girth is something that goes around or encompasses an object. The examiner identifies the finger grip ribs 22 of the reference as meeting this limitation. The grip ribs of the reference extend longitudinally and are not near the top of the device.

The device of claim 1 requires that the interior surface contains a plurality of prongs. The prongs of the claimed device are used to hold the gauze in the container while the gauze is being used to clean a dental instrument during a dental procedure. The examiner identifies the brush 10 of the reference as satisfying this limitation. The brush 10 may be Astroturf ® or some related substance. The brush cleans the dental instrument following a dental procedure and would not be suitable in the claimed device.

The device of claim 1 has a protective rim around the top. This rim extends outwardly from the top of the device and protects the hands of the user against accidental punctures by the dental instrument. The examiner points in the reference to the guard loop numbered 50 and best shown in Figures 1 and 2. This guard loop which resembles a handle cannot be characterized as being a protective rim which is a circular border at the upper edge of the device. The examiner also points to the guard collar numbered 45.

This guard collar does not extend from the top (upper edge), but rather from the circular supporting surface of the ferrule.

In light of the above, it is appellant's view that the rejection of claims 1, 3, and 5 is improper and should be reversed.

Claims 2, 4, and 6

A determination as to whether a valid rejection under 35 USC 103(a) has been made begins with a determination as to whether the factual inquiries set forth by the Supreme Court in *Graham v. John Deere*, 148 USPQ 459 (1966) have been resolved. These factual inquiries provide a background against which the propriety of the rejection may be assessed using the requirements set forth in Section 706.02(c) of the M.P.E.P.

The first factual inquiry required by *Graham* is determining the scope and content of the prior art. The teachings of the references set forth by the examiner in the final rejection are correct. Additional factors taught by the prior art are pertinent to this rejection. Each of the prior art devices is used after the procedure rather than during the procedure as is the device of the claims. The "prongs" of the primary reference are non-absorptive and are used to abrade the soiled dental instruments. The thus-cleaned dental instruments will then be rinsed with the liquid in the bottom of the container. The gauze of the secondary reference is attached to the wall of the container and is used to absorb liquid which will be used to provide a cleansing of the dental instruments.

The second *Graham* factual inquiry is ascertaining the differences between the prior art and the claims in issue. The examiner's attempt at this factual inquiry was to state that the Wallock et al reference fails to disclose that the container includes gauze. To complete the record, it should be noted that Wallock et al. do not teach a finger rest, a

stem, an open container, a girth near the top (not required in claim 6), a plurality of prongs (as understood by appellant), and a protective rim around the top.

The third Graham factual inquiry is resolving the level of ordinary skill in the pertinent art.

Regarding the necessity of determining the level of ordinary skill in the pertinent art, the Fed. Cir. stated in the decision of *Ryko Manufacturing Co. v. Nu-Star, Inc.*, 21 USPQ2d 1053, 1057 (Fed. Cir. 1991):

Appellant asserts legal error in the failure of the district court to resolve the level of ordinary skill in the art. The importance of resolving the level of ordinary skill in the art lies in the necessity of maintaining objectivity in the obviousness inquiry. Instead of ascertaining what was subjectively obvious to the inventor at the time of invention, the court must ascertain what would have been objectively obvious to one of ordinary skill in the art at such time. Hence, the level of ordinary skill in the art is a factual question that must be resolved and considered. (Emphasis added.)

The examiner has not addressed this issue. Appellant has suggested that one of ordinary skill in the art would be a dental technician and the level of skill possessed by this person is assumed to be completion of dental technician educational training and three years of experience as a dental technician. The examiner has not commented on this suggestion. It appears that the third Graham factual inquiry is still unresolved.

The fourth Graham factual inquiry is evaluating evidence of secondary considerations. There is no such evidence in the present application.

The first basic requirement laid down by the M.P.E.P. is that there must be some suggestion or motivation, either in the references themselves or in the knowledge

generally available to one of ordinary skill in the art, to combine the teachings of the references. The examiner stated:

[i]t would have been obvious for one skilled in the art to use the gauze taught by Williams in the Wallock et al container to remove any contaminants remains (sic) on the instrument.

The purpose of the gauze in the Williams reference is to absorb liquid, not the removal of contaminants. Thus, the examiner's construction of the rejection depends upon a use of the gauze which is not disclosed by the prior art.

The examiner appears to have stated that the recent Supreme Court decision, *KSR International Co., v. Teleflex, Inc. et al.*, 82 USPQ2d 1385 (Sup. Ct. 2007) forecloses the argument that a specific teaching, suggestion, or motivation is required to support a finding of obviousness. The PTO has recently published Examination Guidelines for Determining Obviousness Under 35 U.S.C. 103 in View of the Supreme Court Decision in *KSR International Co. v. Teleflex Inc.* at 72 FR 57526. These guidelines require a clear articulation of the examiner's reasoning. Thus, it is stated:

The key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious. The Supreme Court in *KSR* noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit. The Court quoting *In re Kahn* n41 stated that " '[R]ejections on obviousness cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.' " n42

To the extent that it is the examiner's position that it would have been obvious to add the gauze of Williams to the device of Wallock et al to remove any contaminants which remain on the dental instrument, the guidelines go on to state:

The rationale to support a conclusion that the claim would have been obvious is that all the claimed elements were known in the prior art and one skilled in the art could have combined the elements as claimed by known methods with no change in their respective functions, and the combination would have yielded nothing more than predictable results to one of ordinary skill in the art at the time of the invention. n43 "[I]t can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does." n44 If any of these findings cannot be made, then this rationale cannot be used to support a conclusion that the claim would have been obvious to one of ordinary skill in the art. (Emphasis provided)

Since the purpose of the gauze in the prior art is different than in the rejection, the rejection is improper.

The second basic requirement is that there must be a reasonable expectation of success resulting from combining the references. The expectation of success is seen to be coupled with the location of the gauze in the modified Wallock et al. device. If the gauze goes in the bottom of the closed container and fits on the inner surface of the wall to absorb the chemical reagent as this is its function in the prior art, it would not serve to remove any contaminants remaining on the instrument. Indeed, it would not come in contact with the dental instrument. If it replaces the bristles of the closed container of the Wallock et al. device, there would be no prongs as the examiner equates the bristles of Wallock et al. with prongs. If it would be in the closed container portion of the Wallock et al. device in addition to the bristles, the pointed tip of the dental instrument could not get to the liquid chemical reagent in the bottom of the device. If the gauze was located in the open portion of the Wallock et al. device, it would not stay there because there is nothing in the Wallock et al device to keep the gauze in place. It is thus considered that

there would be no reasonable expectation of success resulting from the combination of cited references.

The third basic requirement is that the prior art references must teach or suggest all the claim limitations. The claims call for a finger rest 4. The references do not contain any such component. The claims call for a stem. The references do not teach a stem. The claims call for an open container having an exterior surface, an interior surface, and a top. This could be seen to correspond to the collar guard 45 of the Wallock et al. reference. The claims call for a girth near the top. No component of the prior art resembles this part. The claims require that the interior surface of the container contains prongs. The examiner stated that the Wallock et al. reference teaches a device for cleaning dental instruments comprising containers containing bristles. Somehow, the bristles of the reference are equated with the prongs of the invention. It is not clear just why the examiner would use the gauze of Williams in addition to the bristles of Wallock et al., as see the above discussion. Claims 4 and 6 require that the container contains gauze. The examiner has not been precise as to where the gauze of the Williams reference would go in the device of Wallock et al. The discussion relating to the second basic requirement is pertinent here. Claim 2 requires that the exterior surface of the device be textured. The purpose of this limitation is the improvement of the grip. The examiner has not commented on this requirement. It is considered that the third basic requirement of the M.P.E.P. has not been met.

Claims 7-10

The first Graham factual inquiry is determining the scope and content of the prior art. It is appellant's position that the examiner has properly determined the scope and

content of the cited prior art. The examiner has accurately stated what the prior art teaches. It is considered that the first Graham factual inquiry has been met.

The second Graham factual inquiry is ascertaining the differences between the prior art and the claims in issue. The examiner's attempt at this factual inquiry was to state the things which are not taught by the Cerroni reference. This list is too short. It does not include a device for cleaning dental instruments comprising a finger rest, a stem, an open chamber having an exterior surface, an interior surface having prongs, a top, and a top protective rim. It does not include the limitation of claim 8 wherein the exterior surface of the open container is made of hard plastic and the interior surface of the open container is made of soft plastic.

The third Graham factual inquiry is resolving the level of ordinary skill in the pertinent art. The examiner has not addressed this issue and has not commented upon the suggestion made by appellant.

The fourth Graham factual inquiry is evaluating evidence of secondary considerations. There is no such evidence in the present application.

The first basic requirement laid down by the M.P.E.P. is that there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to combine the teachings of the references. The examiner stated that it would have been obvious for one skilled in the art to use the gauze taught by Williams and the girth and prongs taught by Wallock et al. in the Cerroni container to enhance the cleaning. The examiner has not pointed to any teaching in either of the references which positively sets out this motivation. Therefore, this obviousness is assumed to be a result of some knowledge generally available to one

of ordinary skill in the art. The examiner was called upon to present an affidavit described in 37 CFR 1.104(c)(3) setting forth clearly and precisely the facts which are available to those skilled in the art and which were relied upon by the examiner. No such affidavit was presented. Section 2144.03(C) states:

If applicant adequately traverses the examiner's assertion of official notice, the examiner must provide documentary evidence in the next Office action if the rejection is to be maintained.

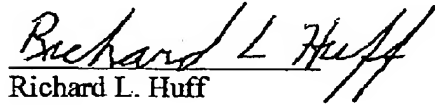
No such documentary evidence has been provided and the rejection may not be maintained.

The second basic requirement is that there must be a reasonable expectation of success resulting from combining the references. The expectation of success is seen to be coupled with the location of the gauze in the modified Wallock et al. device. If the gauze goes in the bottom of the closed container and fits on the inner surface of the wall to absorb the chemical reagent as this is its function in the prior art, it would not serve to remove any contaminants remaining on the instrument. Indeed, it would not come in contact with the dental instruments. If it replaces the bristles of the closed container of the Wallock et al. device, there would be no prongs as the examiner equates the bristles of Wallock et al. with prongs. If it would be in the closed container portion of the Wallock et al. device in addition to the bristles, the pointed tip of the dental instrument could not get to the liquid chemical reagent in the bottom of the device. If the gauze was located in the open portion of the Wallock et al. device, it would not stay there because there is nothing in the Wallock et al device to keep the gauze in place. It is thus considered that there would be no reasonable expectation of success resulting from the combination of cited references.

The third basic requirement is that the prior art references must teach or suggest all the claim limitations. The claims require a finger rest 4. The references do not teach or suggest a finger rest. The claims require a stem. The references do not teach or suggest a stem. The claims require an open container. The Wallock et al. reference teaches a closed container. The claims require a girth near the top. The examiner indicated that the feature numbered 22 in the Wallock et al. reference is a girth. The feature of the Wallock et al. device associated with the numeral 22 is a set of finger grip ribs. These ribs extend longitudinally and are not near the top of the Wallock et al. device. The claims require that the interior surface contains a plurality of prongs. The examiner stated that the Cerroni and Wallock et al. references teach devices for cleaning dental instruments comprising containers containing bristles. Somehow, the bristles of the reference are equated with the prongs of the invention. It is not clear just why the examiner would use the bristles of Wallock et al. in place of the bristles of Cerroni. The bristles of the Wallock et al. reference would not be on the interior surface of the open container of the claimed device. Claims 9 and 10 require that the container contains gauze. The examiner has not been precise as to where the gauze of the Williams reference would go in the device of Wallock et al. The discussion relating to the second basic requirement is pertinent here. Claim 8 requires that the exterior surface of the open container is made of hard plastic and the interior surface of the open container is made of soft plastic. This feature has not been shown. It is considered that the third basic requirement of the M.P.E.P. has not been met. Reversal of this rejection is deemed proper.

For the reasons set forth above, it is considered that the rejection of claims 1-10 is improper and should be reversed.

Respectfully Submitted,


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8) Claims Appendix

1. A device for use in the cleaning of dental instruments comprising:
 - a) a finger rest,
 - b) a stem,
 - c) an open container having an exterior surface, an interior surface, and a top, said exterior surface having a girth near the top, said interior surface containing a plurality of prongs, and said top having a protective rim.
2. The device of claim 1, wherein the exterior surface is textured.
3. The device of claim 1, wherein a cross-section of the device is round.
4. The device of claim 1, wherein the container contains gauze.
5. A device for use in the cleaning of dental instruments comprising:
 - a) a finger rest,
 - b) a stem,
 - c) an open container having an exterior surface, an interior surface, and a top, said interior surface containing a plurality of prongs, and said top having a protective rim.
6. The device of claim 5, wherein the container contains gauze.
7. The device of claim 5, wherein the device is made of flexible material.

8. The device of claim 5, wherein the exterior surface of the open container is made of hard plastic and the interior surface of the open container is made of soft plastic.

9. A method of cleaning a dental instrument having a pointed tip which comprises:

- a) holding the device of claim 4 in one hand,
- b) holding the dental instrument in the other hand,
- c) placing the pointed tip of the dental instrument inside the open container,
- d) putting the pointed tip of the dental instrument in contact with the gauze,
- e) applying pressure to the container to assure firm contact between the instrument and the gauze,
- f) wiping the tip of the instrument on the gauze, and
- g) removing the instrument from the open container.

10. A method of cleaning a dental instrument having a pointed tip which comprises:

- a) holding the device of claim 6 in one hand,
- b) holding the dental instrument in the other hand,
- c) placing the pointed tip of the dental instrument inside the open container,
- d) putting the pointed tip of the dental instrument in contact with the gauze,
- e) applying pressure to the container to assure firm contact between the instrument and the gauze,
- f) wiping the tip of the instrument on the gauze, and
- g) removing the instrument from the open container.

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9) Evidence Appendix

None

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10) Related Proceedings Appendix

None